

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court No. DA 10-0039

ANDY JENSEN,

Plaintiff/Appellant,

v.

APPELLANT'S REPLY BRIEF

ABSAROKEE WATER & SEWER
DISTRICT and KARL GAUSTAD,
MIKE BORSETH, MARY ANNA
ESPELAND, WENDY SCOTT and
DEANN GAUSTAD,

Defendants/Respondents

On Appeal from Montana 22nd Judicial District
Stillwater County
Hon. Randall I. Spaulding, Presiding Judge

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TABLE OF AUTHORITIES

Montana Statutes

Section 2-9-305(5), Mont. Code Ann.	page 3
Section 2-6-401(2), Mont. Code Ann.	page 6
Section 7-13-2277(1), Mont. Code Ann.	page 6
Section 27-26-102, Mont. Code Ann.	page 26

Montana Cases

<i>Denke v. Shoemaker</i> , 2008 MT 57, 347 Mont. 322, 198 P. 3d 284 .	page 4
<i>Goyen v. City of Troy</i> , 276 Mont. 213, 218, 95 P. 2d 824, 828 (1996)	page 5

Perhaps the only thing upon which the parties agree is that a party seeking judgment on the pleadings must establish that there is no material issue of fact, and that they are entitled to judgment as a matter of law.¹

FACTUAL ISSUES PRECLUDE JUDGMENT ON THE PLEADINGS

The following matters were contested:

1. Jensen alleged that Board sessions should be public.² The Board answered that was a legal conclusion requiring no response;³
2. Jensen alleged that Board could act only by ordinance or resolution and that there was no resolution or ordinance authorizing the hiring of a general manager.⁴ The Board admitted the requirement, but denied the claim;⁵
3. Jensen alleged he waived his right to individual privacy.⁶ The Board admitted only that had a resolution providing that all meetings were open. It denied the remaining claims;⁷

¹ Jensen Opening Brief, p. 11; Absarokee Water & Sewer District Board Brief, p. 5.

² Complaint, ¶ 4.

³ Answer, ¶ 4.

⁴ Complaint, ¶ 5, 15.

⁵ Answer, ¶ 5, 15.

⁶ Complaint, ¶¶ 7, 8, 10, 11.

⁷ Answer, ¶¶ 7, 8, 10, 11.

4. Jensen alleged that the *Stillwater County News* ran an advertisement that the Board was seeking a full-time general manager.⁸ The Board admitted placing the ad, but claimed the paper mistakenly listed the position as a “full-time” general manager;⁹
5. Jensen alleged that the ad was placed without Board resolution or order.¹⁰ The Board denied it;¹¹
6. Jensen alleged that Board and its President acted illegally and without authority.¹² The Board admitted Gaustad placed the ad, but denied the claim;¹³
7. Jensen alleged that the Board either met and authorized Gaustad to place the ad, or acted informally without a public meeting and participation. Jensen argued that, if the Board did not authorize Gaustad’s actions, his acts were illegal.¹⁴ The Defendants denied the allegations;¹⁵
8. Jensen alleged that the Board met in closed, “executive sessions” to discuss his job performance contrary to his waiver of privacy. The sessions were recorded. Access to the recordings was refused.¹⁶ The Board admitted it closed

⁸ Complaint, ¶ 14.

⁹ Answer, ¶ 14.

¹⁰ Complaint, ¶ 15.

¹¹ Answer, ¶ 15.

¹² Complaint, ¶ 16.

¹³ Answer, ¶ 16.

¹⁴ Complaint, ¶ 17.

¹⁵ Answer, ¶ 17.

¹⁶ Complaint, ¶¶ 26-36.

portions of its meetings and denied the remaining allegations.¹⁷

Counsel needs to correct a misstatement of fact in the Board's brief.

The brief suggests that Jensen has prevented access to the sequestered tapes so that the records can not be released to either the Board or the public.¹⁸ The assertion is wrong.¹⁹ The Board can make arrangements any time for the recordings to be reviewed. It has refused.

BOARD & BOARD MEMBER IMMUNITY

The Board's brief questions Jensen's claim that Section 2-9-305, Mont. Code Ann. requires a public body to acknowledge its intention to be bound before immunity is extended to members or employees. That's what the statute says.²⁰ There is no such acknowledgment. In fact, the Board

¹⁷ Answer, ¶¶ 26-36.

¹⁸ AWSO Board's Brief, p. 7, 16.

¹⁹ Appendix, Exhibits 14, 15, 19, 21, Transcript, August 31, 2009, p. 159-60.

²⁰ Sec. 2-9-305 **Immunization, defense and indemnification of employees.** (5). Recovery against a governmental entity under the provisions of parts 1 through 3 of this chapter constitutes a complete bar to any action or recovery of damages by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act, error, omission, or other actionable conduct gave rise to the claim. In an action against a governmental entity, the employee whose conduct gave rise to the suit is immune from liability by reasons of the same subject matter ***if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of the employee's employment***, unless the claim constitutes an exclusion provided in subsections (6)(b) through (6)(d). (emphasis supplied).

steadfastly claims that neither it nor its members acted improperly.

The Board's questions Jensen's claim that the Court granted immunity to both the individual board members and the Water District.²¹

The order reads:

As such, § 2-9-305(5) prevents Plaintiff's recovery against *both* the Absarokee Water and Sewer District and the individuals [*sic*] board members acting on behalf of that entity for the same conduct as a matter of law.²² [emphasis in original]

As a matter of law, that finding is clearly erroneous. Board Pres. Gaustad acted with or without the Board's approval. One or the other is responsible. Both are not immune. Immunity does not extend to the manner in which a public body conducts legislative acts. *Denke v. Shoemaker*, 2008 MT 418, ¶56, 347 Mont. 322, ¶56, 198 P. 3d 284, ¶ 56.

TIMELINESS OF CLAIMS

Andy Jensen never sought to challenge the Board's *past* Open

²¹ AWSB Board's Brief, p. 10.

²² Opinion, Appendix 7, p. 5, ll. 21-24.

Meeting violations. He asked that the Court issue a writ of mandate compelling the Board:

- (1) To refrain from conducting matters in executive session without public participation;
- (2) To refrain from refusing to make public records available to members of the public; and
- (3) To refrain from adverse employment or disciplinary action against Jensen until the Court could conduct a hearing.²³

What is clear from the record is that, without Court intervention, the Board will continue to conduct its meetings in violation of its bylaws and Montana law. As to the conduct of its meetings, the Board has no discretion. It has a clear legal duty. Mandamus is appropriate.

Andy Jensen concedes that the Board may have some discretion in employment matters. However, discretion does not give the Board license to ignore its duty to advise an employee of their right to waive their right of individual privacy. *Goyen v. City of Troy*, 276 Mont. 213, 218, 95 P. 2d 824, 828 (1996). Once privacy is waived, the Board has no “discretion” to close a meeting.

²³ Prayer for Relief, Complaint, Appendix 5.

But wait, there's more... The Board had no discretion to advertise Andy Jensen's position without a board resolution or ordinance. The Board had no discretion to advertise for a position not authorized by statute, whether designated as "part-time" or not.²⁴ The Board had no discretion to conduct official business without a public meeting, public participation or a public record. Mandamus is an appropriate remedy - not to curb the Board's discretion - but to require it comply with its clear legal duty to conduct public meetings according to the Montana Constitution, Montana statutes and the Board's by-laws.

TAPE RECORDINGS OF BOARD BUSINESS ARE "PUBLIC RECORDS"

Each of the parties relies on Section 2-6-401(2), Mont. Code Ann.'s definition as to what are "public records."²⁵ That's a question of fact, making a grant of judgment on the pleadings clearly erroneous.

The Court's finding that individual board members were immune is also a finding that the individual Board members were engaged in "official

²⁴ Section 7-13-2277(1), Mont. Code Ann.

²⁵ Jensen's Brief, p. 24, referring to subsection (2)(a); AWSD Board's Brief, p. 15, referring to subsection (2)(c).

business” during the closed “executive sessions.” If so, then subsection (2)(a) applies, and a record is required to be kept as part of an “official record.”

The Board re-frames the argument as Jensen’s request for the delivery of tapes to him. He didn’t request that. Rather, he requested a writ of mandate issue to require the Board to make public records available to members of the public.²⁶ What’s missing from the record is any basis for the trial court’s conclusion that recordings were “for reference purposes only,” or akin to a “preliminary draft.” Absent such a finding, the court’s entry of judgment on the pleadings was clearly erroneous.

JENSEN HAS NO ADEQUATE REMEDY AT LAW

The Board argues that Andy’s Complaint doesn’t allege that he was without an adequate remedy at law. It does.²⁷

The court held the Montana Wrongful Discharge Act is an adequate

²⁶ Complaint, Appendix 7, Prayer for Relief, ¶6.

²⁷ Jensen alleged that advertisement of his position would produce great or irreparable injury. Complaint, ¶ 19.

remedy in the event Andy is fired. The Act provides no remedy for failure to conduct open public meetings or to produce public records. Essentially, the Board's argument is that it may conduct meetings any way it wishes, secure in the belief that, if terminated, Jensen can request damages later. That ignores the impact that the Board's actions had on Andy, his family, his employment and his reputation.

A: [The] Public business is to be done publicly?

A: The district business is to be done publicly, yes.

Q: Now, do you know that it's the responsibility of the board to advise somebody when they do go into executive session of their right to waive their right of privacy?

A: Now.

Q: Didn't then?

A: Didn't then.

- Testimony, Board Vice Pres. Mike Borseth, Absarokee Water and Sewer Board. Aug. 31, 2009 Hearing, Tr. p. 139, ll. 8-25.

CONCLUSION

The Absarokee Water and Sewer District Board and its members have, either deliberately or by default, failed to follow the Montana Constitution, statutes and its by-laws. The Board never tried to address

Andy's concerns before he filed suit. There is no doubt that, left unchecked, the Board will continue to trample on its employee's and constituents' rights.

Plaintiff requests that this Court reverse the order of the trial court and remand with instruction that a writ of mandate and injunction issue in favor of Andy Jensen.

DATED this 8th day of July, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this **Applicant's Reply Brief** is printed with a proportionately spaced George text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect 9.0 for Windows, is not more than 10,000 words (1,768), not averaging more than 280 words per page, excluding Certificate of Service and Certificate of Compliance.

ANDERSON & LIECHTY, P.C.

By: 

Michael B. Anderson

CERTIFICATE OF SERVICE

I hereby certify that I served true and accurate copies of the foregoing **APPELLANT'S REPLY BRIEF** by depositing said copies into the U.S. Postal Service, postage prepaid, addressed to the following:

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Dated this 8 day of July, 2010.

